

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RIGOBERTO HERNANDEZ-
ORTEGA (1),

Defendant.

CASE NO. 10cr4142 JM

ORDER GRANTING MOTION FOR
REDUCTION OF SENTENCE

Defendant Rigoberto Hernandez-Ortega moves for a reduction of his sentence pursuant to 18 U.S.C. §3582(c)(2) and Amendment 782 to the United States Sentencing Guidelines (“USSG”). The Government does not oppose the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the motion is granted and Defendant’s sentence reduced to 70 months.

BACKGROUND

On October 14, 2010, the United States filed a three-count indictment charging Defendant with (Count 1) Conspiracy to Distribute approximately 1.36 kilograms of methamphetamine, in violation of 21 U.S.C. §§ 841 and 846; (Count 2) Distribution of Methamphetamine (approximately .4 kilograms), in violation of 21 U.S.C. § 841(a)(1); and (Count 3) Possession of Methamphetamine with Intent to Distribute (approximately .9 kilograms), in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. On June 21, 2011, Defendant pled guilty to Count Two, and on February 2, 2012, the Court

1 sentenced him to 81 months custody, followed by 3 years of supervised release.

2 To arrive at this sentence, the Court calculated a base offense level of 34, based
3 upon 432.4 grams of actual methamphetamine, reduced 3 levels for Acceptance of
4 Responsibility and departed 2 levels for Fast Track under § 5K2.0. Defendant's criminal
5 history Category was IV, and at a guideline level of 29, his sentencing range was
6 121-151 months. The Court then further departed 33% under § 5K2.0 and 18 U.S.C. §
7 3553(e), and imposed a sentence of 81 months. On October 13, 2015, Defendant filed
8 a Motion for a Sentence Reduction, requesting a reduction to 70 months.

9 DISCUSSION

10 Under 18 U.S.C. § 3582(c)(2), district courts have the authority to modify a term
11 of imprisonment when a defendant was sentenced based on a guideline range that is
12 subsequently lowered by amendment to the USSG. When determining whether a
13 sentencing adjustment is warranted pursuant to § 3582(c)(2), the court must "determine
14 the amended guideline range that would have been applicable to the defendant if the
15 amendment(s) ... had been in effect at the time the defendant was sentenced." USSG §
16 1B1.10(b)(1). "The court shall substitute only the [applicable amendment] for the
17 corresponding guideline provisions that were applied when the defendant was sentenced
18 and shall leave all other guideline application decisions unaffected." *Id.* If the
19 amendment does not lower the guideline range under which the defendant was
20 sentenced, a reduction in sentence is not authorized. USSG § 1B1.10(a)(2).

21 Amendment 782 modified the Drug Quantity Table in USSG § 2D1.1, which
22 provides the base offense levels for different quantities of various controlled substances.
23 Amendment 782 reduced the base offense levels for most federal drug trafficking
24 crimes by two levels. In July 2014, the U.S. Sentencing Commission promulgated
25 Amendment 788 and amended USSG § 1B1.10, which made Amendment 782
26 retroactive (effective November 1, 2014) but delayed until November 1, 2015 the
27 effective date for orders reducing prison terms based on Amendment 782.

28 "[T]he court shall not reduce the defendant's term of imprisonment under

1 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum
 2 of the amended guideline range determined under subdivision (1) of this subsection.”
 3 USSG § 1B1.10(b)(2)(A). The commentary to § 1B1.10 clarifies that the “[e]ligibility
 4 for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment
 5 listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline
 6 range that corresponds to the offense level and criminal history category determined
 7 pursuant to §1B1.1(a), which is determined before consideration of any departure
 8 provision in the Guidelines Manual or any variance).” USSG § 1B1.10 cmt. n.1(A).

9 In Dillon v. United States, 130 S. Ct. 2683, 2691 (2010), the Supreme Court
 10 explained the limited nature of § 3582(c)(2) proceedings and the process for ruling on
 11 motions to reduce sentences under that section.

12 Consistent with the limited nature of §3582(c)(2) proceedings, §1B1.10(b)(2)
 13 also confines the extent of the reduction authorized. Courts generally may “not reduce
 14 the defendant’s term of imprisonment under 18 U. S. C. §3582(c)(2) . . . to a term that
 15 is less than the minimum of the amended guideline range” produced by the
 16 substitution. §1B1.10(b)(2)(A). Only if the sentencing court originally imposed a term
 of imprisonment below the Guidelines range does §1B1.10 authorize a court
 proceeding under §3582(c)(2) to impose a term “comparably” below the amended
 range. §1B1.10(b)(2)(B).

17 The Supreme Court required district courts to follow a two-step process in ruling on
 18 motions under § 3582(c)(2). The Supreme Court cautioned that “[f]ollowing this
 19 two-step approach, a district court proceeding under §3582(c)(2) does not impose a
 20 new sentence in the usual sense.” Id. Furthermore, “proceedings under 18 U.S.C.
 21 § 3582(c)(2) and this policy statement do not constitute a full resentencing of the
 22 defendant.” USSG § 1B1.10(a)(3). The two-step process provided by Dillon, 130 S. Ct.
 23 at 2691-92, is as follows:

24 At step one, §3582(c)(2) requires the court to follow the Commission’s
 25 instructions in § 1B1.10 to determine the prisoner’s eligibility for a
 26 sentence modification and the extent of the reduction authorized.
 27 Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing]
 28 the amended guideline range that would have been applicable to the
 defendant” had the relevant amendment been in effect at the time of the
 initial sentencing. “In making such determination, the court shall substitute
 only the amendments listed in subsection (c) for the corresponding
 guideline provisions that were applied when the defendant was sentenced
 and shall leave all other guideline application decisions unaffected.” At

1 step two of the inquiry, §3582(c)(2) instructs a court to consider any
2 applicable §3553(a) factors and determine whether, in its discretion, the
3 reduction authorized by reference to the policies relevant at step one is
4 warranted in whole or in part under the particular circumstances of the
5 case. Because reference to §3553(a) is appropriate only at the second step
6 of this circumscribed inquiry, it cannot serve to transform the proceedings
7 under §3582(c)(2) into plenary resentencing proceedings.

8 The district court's discretion at step two is limited. See Freeman v. United
9 States, 131 S. Ct. 2685, 2693 (2011) (Noting that "[t]he binding policy statement
10 governing §3582(c)(2) motions places considerable limits on district court discretion").
11 In Freeman, the Supreme Court further explained that "[i]n an initial sentencing
12 hearing, a district court can vary below the Guidelines; but, by contrast,
13 below-Guidelines modifications in §3582(c)(2) proceedings are forbidden, USSG
14 §1B1.10(b)(2)(A), except where the original sentence was itself a downward departure
15 [pursuant to] §1B1.10(b)(2)(B)." Freeman at 2693. As a result, this Court is not
16 permitted to engage in a de novo resentencing in a § 3582(c)(2) proceeding and
17 therefore cannot grant the same departures or variances granted at the initial sentencing
18 hearing, unless that departure was granted pursuant to a government's motion for
19 substantial assistance as defined by the Guidelines.

20 Here, under the Amended Guidelines, the base offense level for 432.4 grams of
21 actual methamphetamine is level 32. After a reduction for Acceptance of Responsibility
22 (-3) and for Fast Track (-2), the amended offense level is 27, with a Guideline range of
23 100 to 125 months at a Criminal History Category of IV. Because Defendant
24 cooperated and provided substantial assistance to the Government, the court is
25 authorized to further reduce the sentence. See § 1B1.10(b). Upon consideration of the
26 sentencing factors enumerated at 18 U.S.C. §3553(a), the court finds that a further
27 reduction is both permissible under § 1B1.10(b) and supported by the record. As the
28 original sentencing departure consisted of a departure for both cooperation and Fast

1 Track, the court reduces the sentence to 70 months.¹ This particular sentence satisfies
2 the sentencing factors of 18 U.S.C. §3553(a) and Amendment 782.

3 In sum, the court grants the motion for a reduction in sentence and imposes an
4 amended custodial sentence of 70 months.

5 IT IS SO ORDERED.

6 DATED: October 24, 2016



Jeffrey T. Miller
United States District Judge

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28 ¹ The court notes that the original sentence reflected a departure for both cooperation and Fast Track. A Fast Track departure under §5K2.0 does not serve as a basis for further reduction under Amendment 782.